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4/26/01

MTA

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

DENNIS BASS,

Petitioner

v.

COURT OF COMMON PLEAS OF
LUZERNE COUNTY and
THE ATTORNEY GENERAL OF
THE STATE OF PENNSYLVANIA,

Respondents

CIVIL NO. 1:CV-01-0082

(Judge Rambo)

(Magistrate Judge Blewitt)

FILED

HARRISBURG, PA

APR 26 2001

MARY E. D'ANDREA, CLERK
Per _____ Deputy Clerk

MEMORANDUM AND ORDER

Petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 challenging a 1998 conviction in Luzerne County, Pennsylvania. The magistrate judge to whom this matter was referred recommended that the action be dismissed for failure to exhaust. The undersigned, noting that the transcript of the state proceedings had not been transcribed after a two year period, issued a show cause order why exhaustion should not be excused. In the court's memorandum several cases were cited as to what constitutes delay.

In response to the show cause order, the County Respondent filed the trial transcript and a response. In the response County Respondent cites Cross v. Lackawanna County District Attorney, 204 F.3d 453 (3d Cir. 2000) and Story v. Kindt, 26 F.3d 402 (3d Cir. 1994), for the proposition that the instant petitioner's delay was not as long as the above cases which had delays of seven and nine years, respectively, and which were considered undue delay -- implying that anything less would not excuse exhaustion.

Counsel fails to acknowledge the court's recognition in Story of the 33 month delay in Wojtezak v. Fulcomer, 800 F.2d 353 (3d Cir. 1986); the three year delay in United States ex rel. Senk v. Brierley, 471 F.2d 657, 660 (3d Cir. 1973), and United States ex rel. Geisler v. Walters, 510 F.2d 887, 893 (3d Cir. 1975). See Story v. Kindt at 405.

Nor do Cross and Story imply that had these cases been presented to the Third Circuit in less than seven or nine years, exhaustion might still have been excused.

In any event, now that Petitioner has received¹ a copy of the trial transcript, he should be in a position to have the state court address his concerns. **IT IS THEREFORE ORDERED THAT:**

- 1) The court adopts in part and rejects in part the report and recommendation of Magistrate Judge Blewitt.
- 2) The captioned action is dismissed for failure to exhaust state remedies.
- 3) The captioned habeas petition shall not count as a previous habeas petition such that Petitioner is penalized from filing a second petition.
- 4) The Clerk of Court shall close the file.


SYLVIA H. RAMBO
United States District Judge

Dated: April 26, 2001.

¹The court assumes Petitioner has received a copy of what has been filed in the district court. This court is not responsible for supplying Petitioner with a copy.

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF PENNSYLVANIA

* * MAILING CERTIFICATE OF CLERK * *

April 26, 2001

Re: 1:01-cv-00082 Bass v. Court of Common Plea

True and correct copies of the attached were mailed by the clerk to the following:

Dennis Bass
Community Corrections Center
DW 6560
240 Adams Street
Scranton, PA 18504

Frank P. Barletta, Esq.
District Attorney's Office
Luzerne County Courthouse
200 North River Street
Wilkes-Barre, PA 18711

CC:

Judge	(X)	Rambo	()	Pro Se Law Clerk
Magistrate Judge	(X)	Blewitt	()	INS
U.S. Marshal	()		()	Jury Clerk
Probation	()			
U.S. Attorney	()			
Atty. for Deft.	()			
Defendant	()			
Warden	()			
Bureau of Prisons	()			
Ct Reporter	()			
Ctroom Deputy	()			
Orig-Security	(X)			
Federal Public Defender	()			
Summons Issued	()	with N/C attached to complt. and served by:		
		U.S. Marshal ()	Pltf's Attorney ()	
Standard Order 93-5	()			
Order to Show Cause	()	with Petition attached & mailed certified mail		
		to: US Atty Gen ()	PA Atty Gen ()	
		DA of County ()	Respondents ()	
Bankruptcy Court	()			
Other	()			

MARY E. D'ANDREA, Clerk

4/26/01

Mary E. D'Andrea